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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>RONALD LAURON,<br>Defendant and Appellant. | A150571<br><br>(San Mateo County<br>Super. Ct. No. NF431677) |

A jury convicted defendant Ronald Lauron of 28 counts of sex offenses against a young victim who considered defendant's daughter to be her best friend. Defendant's criminal sexual conduct began when the victim was 13 years old and continued for two years.

The appeal raises only one issue: whether the trial court abused its discretion in sentencing by not considering information that the victim used the screen name "vagina cakes" on Kik, a messaging application. Defendant argues on appeal that this screen name was a "unique" fact that the trial court was "duty bound" to consider and had the trial court done so, it would have imposed a sentence more favorable to defendant. As we will discuss, the victim's use of this screen name was never introduced in evidence at trial or at the sentencing hearing. It had been the subject of a defense pretrial motion and Evidence Code section 402 hearing, at which defense counsel was given free rein but chose not to cross-examine the victim on the issue. We conclude there was no error by the trial court in sentencing defendant and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Beginning when she was 13 years old and continuing until she was 15, J.D. was sexually molested by defendant, who was the father of her "very best friend." The molestation occurred at defendant's house where J.D. often spent the night with his daughter. It started with defendant touching J.D. outside her clothes during a sleepover. It escalated to defendant putting his hands on her breasts, and later placing J.D.'s hand on his penis. Defendant digitally penetrated J.D.'s vagina, put his mouth on her vagina and on her breasts. He made J.D. masturbate him and orally copulate him. Defendant also had sexual intercourse with J.D. twice; the first time, J.D. was between ninth and tenth grade.

J.D. testified she never encouraged defendant or sat too close to him. Defendant told her not to tell anyone or something bad might happen. J.D. was worried that she would lose defendant's daughter as her best friend if she did.

When J.D. was 15 years old, she began attending a therapeutic day school for emotionally disturbed teenagers and began seeing a therapist. She stopped going over to defendant's house between her sophomore and junior year because defendant would molest her whenever she was alone with him.

When she was 16 years old, J.D. texted defendant's daughter and explained that she had stopped going to her house because defendant had been molesting her, and she was going to report what defendant had done to the police. J.D. told defendant's daughter that she still wanted to be friends.

J.D. then told her therapist that defendant had been molesting her for two years. J.D. was distraught, anxious, crying and shaking. The therapist made a police report. The next day, J.D. was interviewed at the Keller Center by a licensed clinical social worker who is trained as a forensic interviewer.

Later, J.D. made a pretext phone call to defendant in which she confronted him about "what has happened when I stay over at night." When she asked him "[w]hy did you finger me," he replied, "I don't know why you're saying this now," and he refused to answer her other questions, demurring that he was at work.

About a week later, defendant was interviewed by two officers at a police station. At first he denied any sexual contact with J.D. Then he claimed that J.D. used "body language" and tried to sit on his lap to the point where matters escalated. Eventually he confessed to many sexual acts involving J.D.

At trial, defendant testified he never sexually molested J.D. He said he admitted sexual acts to the police officers because he felt trapped and scared.

The jury found defendant guilty of one count of committing a lewd act with a minor under the age of 14 (Pen. Code,[1] § 288, subd. (a); count 1), 10 counts of oral copulation with a minor under the age of 15 (§ 288a, subd. (b)(2); counts 2 through 11), 10 counts of a lewd act with a minor 14 or 15 years old (§ 288, subd. (c)(1); counts 12 through 21), two counts of unlawful sexual intercourse with a minor more than three years younger than the defendant (§ 261.5, subd. (c); counts 22 and 23), and five counts of unlawful sexual penetration of a minor more than three years younger than the defendant (§ 289, subd. (i); counts 24 through 28).

At sentencing, the trial court considered sentencing memoranda filed by both sides, dozens of letters filed in support of defendant, a detailed pre-sentence report from the probation department, oral statements at the hearing from J.D.'s mother, defendant's wife and defendant himself, and the arguments of counsel. The trial court sentenced defendant to 18 years and 8 months in state prison.

**DISCUSSION**

Defendant claims the trial court abused its discretion in sentencing him when it failed to consider "this one fact" that J.D. used the screen name "vagina cakes" on a messaging application known as Kik. We conclude the trial court did not abuse its discretion in sentencing defendant.

[1] All statutory references are to the Penal Code, unless other indicated.

A. *Additional Background*

1. Cell Phone Evidence and J.D.'s Purported Sexual Knowledge

In connection with the police investigation of this case, J.D.'s phone was downloaded; she was 16 years old at the time. Among other things, the download showed that J.D. had visited a pornography website and had downloaded photographs with sexual content. It also showed text message conversations on the Kik application, where J.D.'s screen name was "vagina cakes."

Defendant filed a motion before trial for "use of phone download." Defense counsel argued the text messages and the photos "indicate a young woman who is highly sexualized, to the point of surfing porn sites on the internet, and sharing photos of naked people." Defense counsel sought to cross-examine J.D. "about this content, lest the jury be misled to believe that she is a naïve 16 year old who would have no reference to describe sex acts allegedly perpetrated by the defendant."

At the hearing on defendant's motion, defense counsel noted in passing that J.D. had disclosed at her Keller Center interview that she had changed her screen name on the Kik application to "vagina cakes." The trial court decided to hold an Evidence Code section 402 hearing (402 hearing), considering it appropriate for the defense to question J.D. about the source of her sexual knowledge. At the 402 hearing, defense counsel questioned J.D. about visits to a pornographic website and seeing photographs of people having various forms of sex, and about photographs of erect penises that were downloaded on her phone, but he did not ask about her screen name on the Kik application.

At the end of the 402 hearing, defense counsel argued he should be allowed to question J.D. about pictures on her phone and the fact that she had visited a pornography site, since this went to her knowledge of sexual acts. Defense counsel made no mention of wanting to ask about the Kik screen name at trial, a subject he had not broached at the 402 hearing.

The trial court ruled that defense counsel could inquire at trial about the subjects that had been asked about at the 402 hearing.

In cross-examining J.D. at trial, defense counsel asked J.D. about her statement to the forensic interviewer at the Keller Center that defendant had an "abnormally small" penis, her viewing a pornography website in seventh grade and what she saw, and the photographs of erect penises on her cell phone. Defense counsel chose not to ask any questions about J.D.'s screen name on the Kik application.[2]

2. Sentencing

Defendant filed a comprehensive sentencing memorandum, attaching more than 30 letters attesting to his character, a psychologist's report, and two competency evaluations that had been previously prepared for the court. The memorandum stated that although defendant had denied responsibility during trial, it was his counsel's view that defendant would accept responsibility at sentencing, express remorse, and apologize to J.D. Yet the memorandum also referred to "voluminous letters" in support of defendant, and asserted that "[f]riends of his daughters who spent time with him, including those who testified at the trial, believe he has been falsely convicted because these actions are contrary to the way he acted with them."

The defense sentencing memorandum called out J.D.'s testimony that she visited pornography sites, admitted to having pictures of penises on her phone, and that she was sexually active with her boyfriend when she was 15. It continued, "This writer doesn't know why this child was so inclined. It may reflect that she was molested when she was much younger, and became sexualized at an early age. It doesn't appear to this writer that the actions of [defendant] were the etiology of her sexual preoccupation. Her interest in sex may have played a role in why [defendant] chose to engage with her in sex acts. This is offered as explanation as to how this otherwise law abiding and caring man, crossed the line and engaged in egregious conduct." Some of the supporting letters

[2] In his brief on appeal, defendant states that defense counsel "chose not to cross-examine at all" on the screen name, adding that '[n]one of these tactical choices by counsel are questioned." Defendant states that cross-examining a "traumatized teenager with ongoing emotional problems" in a case like this "is a very delicate matter requiring fine judgments by counsel." Defendant does not claim defense counsel provided ineffective assistance of counsel at any stage of the case.

attacked J.D in various ways. One writer asserted J.D. had "a lot of psychological issues and needs a lot of help," another wrote that J.D. told "gigantic stories about her sexual experiences with both men and women," and another referred to J.D.'s "past." On appeal, defendant characterizes these letters as being "consistent with . . . J.D. having strongly sexualized predilections consistent with adopting a screen name 'vagina cakes.' " But once again, there is no mention of the Kik application or the screen name in the defense sentencing memorandum.

At the sentencing hearing, defense counsel pointed out that children who spent time at defendant's home wrote letters in his support, prompting the trial court to observe that the fact defendant may have singled J.D. out "highlight[s] the disabilities, if you will, or the mental health issues and, in turn, direct[s] a spotlight on the increased vulnerability of [J.D.]."

Defense counsel responded, "I would remind the Court that we had a download of her phone that showed that she was visiting porn sites before any of this happened . . . . I don't know whether that caused her to become more receptive or—I just don't know. I don't know the answer to it. [¶] I do know that she appeared to be very troubled when she was on the witness stand. She clearly has been affected by this. . . . [¶] . . . [¶] I don't think that [defendant] ever thought that he was injuring this child because he just didn't think of it for—"

The trial court then interjected, "[Defense counsel], I don't know that we necessarily are going to go down that road. I mean, Mr. Lauron is an adult . . . . I don't understand how it is that Mr. Lauron would expect the Court to somehow not excuse but mitigate the behavior because of the lack of intent to hurt the teenager."

The trial court stated that it had read the probation report and found defendant's "level of remorse, acceptance of responsibility, acknowledgment of wrongdoing" was "tepid at best." To the trial court, the report showed defendant was sorry that he was caught and had to face the consequences, not truly sorry for "the impact that his actions have had."

The trial court acknowledged the Static 99 report score of zero, suggesting low likelihood of recidivism, but was still "left with the belief that [defendant] preyed upon [J.D.]."

In pronouncing sentence, the trial court stated that it had weighed all of the factors and considered whether a probationary sentence was appropriate, but concluded it was not, given the court's views that defendant lacked true remorse, and lacked acknowledgment of his wrongdoing, and "inflicted a high degree of emotional injury upon the victim."

The court imposed the upper term of eight years on count 1 because the victim in this case was "extremely vulnerable." The court sentenced defendant to consecutive sentences on counts 2 through 7, counts 12 through 17, and count 24 through 27 because defendant "violated a position of trust." The trial court sentenced defendant to concurrent terms on the remaining counts. The total sentence was 18 years and 8 months.

B. *Analysis*

Defendant argues the trial court was "duty bound" to consider the "vagina cakes evidence" at sentencing, because it was on "actual notice of the existence of this fact" and it was "highly material to the trial court's reasons in determining a sentence." Defendant contends "this one fact—that J.D. called herself 'vagina cakes' on a phone messaging service—should have been extremely likely to influence the trial court's sentencing decision, had the trial court considered it." This was "unique circumstantial evidence: It was the only evidence which *required* the inference that J.D. had portrayed herself as voluntarily seeking sexualized activity either during or prior to the period of the charged offenses; and thus, that she was capable of doing so during that period." It had "unique persuasiveness." Defendant urges that the trial court's stated reasons for the sentence it imposed, and its finding of no mitigating factors "could not reasonably have been reached, had the court considered the 'vagina cakes' evidence consistent with its plain meaning." That is because evidence of the screen name would have established the mitigating factor that "the victim was an initiator of, willing participant in, or aggressor or provoker of the incident." (Cal. Rules of Court, rule 4.423(a)(2).

1. Standard of Review

A trial court has broad discretion under California's sentencing scheme to weigh aggravating and mitigating factors. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) We review a trial court's decision to impose the upper term sentence under an abuse of discretion standard. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Generally, a trial court is presumed to have been aware of and followed the law, including the law on sentencing discretion. (*People v. Martinez* (2017) 10 Cal.App.5th 686, 728.) "A trial court's decision to impose a particular sentence is reviewed for abuse of discretion and will not be disturbed on appeal 'unless its decision is so irrational or arbitrary that no reasonable person could agree with it.' . . . Even if a trial court has stated both proper and improper reasons for a sentence choice, 'a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper. [Citation.]' " (*People v. Jones* (2009) 178 Cal.App.4th 853, 860-861.)

2. The Claim is Forfeited

" 'In general, the forfeiture rule applies in the context of sentencing as in other areas of criminal law.' [Citation.] . . . [C]laims of error in the trial court's exercise of its sentencing discretion are . . . forfeited if not raised at the sentencing hearing. Such errors are essentially factual, and thus distinct from ' "clear and correctable" ' legal errors that appellate courts can redress on appeal 'independent of any factual issues presented by the record at sentencing.' " (*People v. Trujillo* (2015) 60 Cal.4th 850, 856-857.) As our Supreme Court wrote in *People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*), "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it . . . misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons."

Here, we agree with the Attorney General that defendant forfeited his appellate claim by never raising the Kik screen name at sentencing. The defendant filed a

comprehensive sentencing memorandum, which we have described above, squarely raising the issue of J.D.'s sexual sophistication, emphasizing she was "sexualized at an early age," her "sexual preoccupation," her visits to pornography sites, the pictures of penises on her telephone, and even that she was sexually active with her boyfriend at age 15. But notably absent from the sentencing brief and the sentencing hearing is any mention of the Kik application or the "vagina cakes" screen name that is the focus of this appeal.

Defendant concedes that the Attorney General is "correct" about the holding in *Scott*, but argues the trial court "*has no discretion* to fail to consider a fact material to sentencing of which it is actually aware." But defense counsel made the affirmative choice not to elicit the evidence at trial (or even at the 402 hearing), not to offer it in evidence at the sentencing, and not even to mention it in support of finding a mitigating factor. None of the cases cited by defendant supports his position that the trial court had a "duty" to consider it, nonetheless.

Defendant principally relies on *People v. Burney* (1981) 115 Cal.App.3d 497, 505. But that case is easily distinguished on its facts. In *Burney*, the trial judge explicitly stated it found no circumstances in mitigation, but, in fact, the probation report disclosed mitigating circumstances—that the defendant's past performance on parole was good and that the defendant acknowledged wrongdoing shortly after being arrested. Because the trial court apparently did not consider these mitigating circumstances, the defendant was entitled to a sentencing hearing "on the question of circumstances in mitigation and aggravation." (*Id.* at pp. 505-506.) Nothing in *Burney* suggests that the trial court was "duty bound" to consider a single fact such as the Kik screen name which was not in evidence, or part of the written or oral record of the sentencing hearing. Nor do any of the other cases cited by defendant in connection with this argument remotely support the proposition that the trial judge was "duty bound" to consider evidence not before the court: in *People v. Covino* (1980) 100 Cal.App.3d 660, 670, the trial court failed to take into account circumstances in mitigation that were "stated in the attorney's, employer's and friend's letters," erroneously limited itself to circumstances of mitigation set forth in

the rules of court, and incorrectly found that the defendant had a prior conviction; in *People v. Nuno* (2018) 26 Cal.App.5th 43, 50-52, the trial court was "under the erroneous impression" that defendant was presumptively ineligible for probation; in *People v. Alvarez* (2002) 95 Cal.App.4th 403, 409, the trial court "sentenced [the defendant] under the mistaken impression he was presumptively ineligible for probation under section 1203."

Defendant seems to contend that where it is tough to argue about specific evidence, counsel should be excused from mentioning a fact directly, and may simply rely on the trial court's "duty" to intuit its importance.[3] With no citation to legal authority in support of this argument, defendant poses a series of rhetorical "systemic question[s]" about sentencing, asking whether the trial court has a "broader moral-based duty to make its own determination of the proper punishment from all of the reliable information presented to it, even if due to (for example) high sensitivity, the defendant's counsel is reluctant to emphasize a particular subset of that information and thus might not state every material fact i [*sic*] that subset?" Defendant states, "The sentencing issue raised comes down to: Given that the trial court was on actual notice of this evidence and its availability, plus the obvious sensitivity of the evidence, who was responsible for ensuring the court considered it at sentencing—the defendant's attorney, or the court itself?"

Defendant cannot have it both ways. Defendant claims the screen name evidence is so "unique" and so "highly material" that not considering the screen name evidence was an abuse of discretion. On the other hand, he seeks to excuse defense counsel's failure to bring up or even refer to this fact in connection with the sentencing because it

[3] Defendant posits on appeal that defense counsel at the sentencing hearing "cho[]se his words carefully" because he "didn't want to come across as 'blaming the victim.' " He contends the same was true for the sentencing memorandum, where although defense counsel referred to J.D.'s "sexual preoccupation" and "interest in sex," counsel did not go on "at length—presumably also to avoid coming across as 'blaming the victim.' "

had the possibility of backfiring, and to impose a duty on the trial court to consider this "unique" fact at sentencing.

On these facts we have no difficulty concluding that the issue is forfeited. But even if it is not forfeited, there was no abuse of discretion in the sentence that the trial court imposed.

3. The Information is Irrelevant to Circumstances in Mitigation

Relevant evidence is "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The Attorney General contends the screen name was not relevant to whether J.D. was the "initiator" or "aggressor" or "provoker" of the sexual contact. He points out, "[t]here was no evidence whatsoever that J.D. had ever used the screen name or the Kik application to lure [defendant], or to engage in sexual activity with him or any other males. In fact, it is unclear from the record whether J.D. even used that screen name ('vagina cakes'), which she had changed from something else, when appellant first began molesting her in seventh grade." In his reply, defendant *concedes* these points.

But if there was no evidence that J.D. used the screen name "vagina cakes" with defendant, or that she even used it during the time defendant was molesting her, then there is no tendency in reason that it proves that J.D. provoked or initiated sexual conduct with the defendant. Evidence of the screen name, therefore, is irrelevant to the question of mitigating circumstances.

Defendant argues that, despite his concession, the screen name is "strongly suggestive of availability and desire for sexual activity." It "*required*" the inference that J.D. had "portrayed herself as voluntarily seeking sexualized activity either during or prior to the period of the charged offenses; and thus, that she was capable of doing so during that period." We are not persuaded by this theory of relevance. Defendant started molesting J.D. when she was 13, a time of physical, emotional and sexual growth for an adolescent. If she started using the screen name *after* two years of being molested by defendant (and there is no evidence to the contrary), the screen name does not suggest what she was "capable" of during the years she was defendant's victim. To the contrary,

adopting this screen name could be additional evidence of the harm defendant caused her. That is, without evidence that J.D. used the screen name before defendant first molested her, the screen name could be a product of the emotional damage that the defendant (in his 40's) caused a young teenager by sexually abusing her for two years and robbing her of a natural sexual development with partners her own age.

4. There is No Prejudice

Even assuming the screen name had some relevance at sentencing (and it did not), defendant has not shown prejudice.

First, leaving aside the trial court's asserted failure to consider the screen name evidence, defendant does not argue on appeal that the trial court relied on improper considerations in sentencing defendant to the upper term. Nor could it. The court found the aggravating factor that the victim was particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3), and the presence of one aggravating factor is sufficient to impose an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

Second, there was plenty of evidence about J.D.'s sexuality in the sentencing memorandum and at the sentencing hearing itself. Defendant argues on appeal that the screen name evidence "would have *further corroborated the inference* that J.D.'s self-portrayal as voluntarily seeking out sexual activity . . . extended to the current case." (Emphasis added.) This statement highlights just how much information there was at the sentencing about J.D.'s sexuality. Defense counsel mentioned that J.D. visited pornography sites "before any of this happened," and speculated "I don't know whether that caused her to become more receptive or—I just don't know. I don't know the answer to it." Defense counsel continued, "victims come from everywhere. Some are very vulnerable. Some deal with it and don't ever tell anybody. There are lots of things that happen. [¶] But the fact is this is a man that is not going to be a recidivist when he gets out of prison. . . . [T]his behavior was aberrant and may be because of the vulnerability of [J.D.]. I don't know." The trial judge responded directly to defense counsel, "you have appeared in front of me a number of times, and you know that all of the things that you're mentioning are definitely things that I take into consideration." But

the trial court was clearly not persuaded by defense counsel's argument. As we have described above, it went on to emphasize defendant's failure to accept responsibility, his lack of remorse, and the victim's "extreme[]" vulnerability.

On this record, we conclude it is not reasonably probable defendant would have received a more favorable sentence had the trial court expressly considered J.D.'s screen name on the Kik application.

## DISPOSITION

The judgment is affirmed.

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Miller, J.

We concur:

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Richman, Acting P.J.

_____
Stewart, J.

A150571, *People v. Lauron*